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July 29, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 1, 2004

Case No.: TIA-0075

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee, and he claimed that he has two illnesses that are a result of exposure to toxic substances at a DOE facility. An independent physician panel (the Physician Panel or the Panel) rendered negative determinations on the illnesses. The OWA accepted the Panel's determinations, and the Applicant appealed to the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Applicable Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs, one of which is administered by the DOE. 1/

The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE

1/ The Department of Labor administers the other program. See 10 C.F.R. Part 30; www.dol.gov/esa.

instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program. 2/

B. The Application

The Applicant was employed for 22 years in a variety of jobs at a DOE site - performing maintenance on the roads and grounds, inspecting tanks, and working at the fire department. Record at 14. The Applicant sought physician panel review of two claimed illnesses: chronic obstructive lung disease and hearing loss. *Id.* at 3. He claimed exposure to "all chemicals and contamination in every building at the plant." *Id.* at 14.

The OWA referred the application to a physician panel. The Panel's determinations are reflected in a December 2003 report.

The Panel found evidence that the Applicant has a "mild obstructive lung defect" compatible with a diagnosis of chronic obstructive lung disease. The Panel determined, however, that the lung disease was not related to his employment at DOE. The Panel noted the lack of evidence to support the claimed exposures, and found that the Applicant's X-rays were negative for dust induced pulmonary disease. The Panel noted the Applicant's significant smoking history - 2 to 3 packs per day for over 30 years - and stated that his pulmonary symptoms were "classic for so called 'smoker's lung.'" Report at 1.

The Panel found that the Applicant had hearing loss at least as far back as 1981, two years after he began work at DOE. The Panel noted his exposure to noise in his prior job and at DOE. The Panel found that the Applicant's hearing loss met all the criteria for noise-induced hearing loss and that there was no evidence of significant exposure to audiotoxic solvents.

2/ See www.eh.doe.gov/advocacy.

The OWA accepted the Physician Panel's negative determinations, and the Applicant appealed. The Applicant objects to the Panel's determination on his lung disease, stating that he was exposed to toxic substances and that he stopped smoking for a period of time. He also objects to the Panel's determination on his hearing loss, stating that it was attributable to noise at the DOE workplace. Finally, he states that he has colon problems, and he attributes them to his DOE work.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure during employment at DOE. The Rule requires that the panel (i) consider each claimed illness, (ii) make a finding whether the illness was related to a toxic exposure at DOE and (ii) state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where we find error in the panel process. For example, we have remanded applications where the panel report did not address all the claimed illnesses, 3/ applied the wrong standard, 4/ or failed to explain the basis of its determination. 5/ On the other hand, mere disagreements with the panel's opinion do not indicate panel error. 6/

The Applicant has not identified panel error. The Panel report indicates that the Panel considered the record thoroughly, and the Applicant has not identified any factual error. The Panel's description of the Applicant's smoking history is consistent with the description he provided in a February 2001 questionnaire. Record at 39. More importantly, the Applicant does not dispute that he smoked for over thirty years: although the Applicant states that he quit three years earlier than he reported in the questionnaire, he also states that he has smoked for the last five years. Similarly, the Applicant does not dispute the Panel's finding that his hearing loss is noise-induced. Whether

3/ *Worker Appeal*, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).

4/ *Worker Appeal*, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

5/ *Id.*

6/ *Worker Appeal*, Case No. TIA-0066, 28 DOE ¶ _____ (2004).

the noise occurred in a prior job or at DOE is not relevant, because noise is not a "toxic substance" and, therefore, not covered by the DOE program. See 42 U.S.C. § 7385o(d)(3); 67 Fed. Reg. 52843. See also, e.g., *Worker Appeal*, Case No. TIA-13, 28 DOE ¶ 80,262 (2003).

Finally, the Panel's failure to consider colon problems was not an error. The Applicant did not mention these problems in his application. If the Applicant seeks panel review of those problems, the Applicant should file a request with the OWA.

As the foregoing indicates, the Applicant has not identified any error in the physician panel process. Accordingly, the Appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0075 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 29, 2004